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Explanation for Proposed Constitutional Amendment
To Be Voted on at the November 6, 2012, Election

PROPOSED CONSTITUTIONAL AMENDMENT

Article I. Bill of Rights.

Section 11. Due process of law; obligation of contracts; taking of private property;
prohibited discrimination; jury trial in civil cases.

BALLOT QUESTION

Shall Section 11 of Article I (Bill of Rights) of the Constitution of Virginia be amended (i) to require that eminent domain only be exercised where the property taken or damaged is for public use and, except for utilities or the elimination of a public nuisance, not where the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development; (ii) to define what is included in just compensation for such taking or damaging of property; and (iii) to prohibit the taking or damaging of more private property than is necessary for the public use?

EXPLANATION

Current Constitution and Background. Article I, Section 11 of the current Constitution prohibits the taking or damaging of private property for public uses without just compensation. The power to take private property for public uses is known as the power of eminent domain. If a private property owner and the entity acquiring property for a public use cannot agree on the sale of the property, the property may be taken by eminent domain and the amount of just compensation is decided in a court proceeding.

In a 2005 case from Connecticut, the United States Supreme Court upheld the taking of private property and its transfer to a private business for economic development purposes and also said that states could restrict the use of eminent domain (*Kelo v. City of New London*, 545 U.S. 469). Two years later, the Virginia General Assembly enacted § 1-219.1 of the Code of Virginia and set limits on the use of eminent domain powers. For example, § 1-219.1 provides that no more private property may be taken than is necessary for the stated public use, that the public interest for the taking must outweigh any private gain, and that private property cannot be taken for certain primary purposes such as increasing the tax base, revenues, or employment.

Proposed Amendment. The proposed constitutional amendment continues the approach and concepts set out in § 1-219.1. However, while limits in the Code can be amended by any future General Assembly, the proposed amendment, if approved by the voters, could only be changed by a future constitutional amendment approved by the voters.

The proposed amendment includes the following:

- The right to private property is a "fundamental" right.
- The taking or damaging of private property must be for a "public use."
- No more property may be taken or damaged than is necessary for the stated public use.
- A "public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services." Elimination of a public nuisance may be a public use. It is not a public use if the "primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development."
- Just compensation for property taken is expanded and defined to be "no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking." The terms "lost profits" and "lost access" are to be defined by the General Assembly, and it has done so by separate legislation that will become law if this proposed amendment is approved by the voters (Chapters 699 and 719, 2012 Acts of Assembly).
- The entity condemning property, known as the condemnor, has the burden to prove that the property is being taken for a public use.

FULL TEXT OF AMENDMENT [Proposed new language is underlined. Existing language that is deleted is shown as stricken (~~stricken~~).]

Amend Section 11 of Article I of the Constitution of Virginia as follows:

ARTICLE I BILL OF RIGHTS

Section 11. Due process of law; obligation of contracts; taking or damaging of private property; prohibited discrimination; jury trial in civil cases.

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, ~~nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly;~~ and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms "lost profits" and "lost access" are to be defined by the General Assembly. A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The condemnor bears the burden of proving that the use is public, without a presumption that it is.

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Explanation: 484 words

Approved by House and Senate Committees on Privileges and Elections April 18, 2012